Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

WYOMING OUTFITTERS ASSOCIATION, JIM ALLEN, TIM TREFREN, JOHN WINTER, BOBBI WADE, VINCE VAN ROEGEN, KIM R. CARRARA, WALTER LEE JONES, CRAIG ARTMAN, and ERIC LARSEN,

Petitioners,

v.

WYOMING GAME AND FISH COMMISSION, HAL CORBETT, LES HENDERSON, TRACY HUNT, L. GARY LUNDVALL, J. MICHAEL POWERS, MIKE MUNZIE, DAVE STEGER, and JOHN BAUGHMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At the time that the decision was rendered by the United States District Court, the petitioners' counsel had suffered a serious automobile accident that disabled him and required daily physical therapy. He received the judgment a week late because of mail delays and at the same time, his solo and pro bono practice suffered the loss of *all* secretarial support including the medical emergency of and hospitalization of the assigned and sole remaining legal secretary in the very week the notice of appeal was due, and counsel was unable to communicate sufficiently with the petitioners because they resided throughout the U.S.A. the most important of which were in wilderness areas reachable only by horseback or foot who no longer were waiting in anticipation of a decision after having waited two seasons (nearly 18 months) for a decision. As a result, the notice of appeal with a motion for extension of time to file it was filed after 30 days (approximately 2 weeks late) but before 60 days which was subsequently denied. The questions presented are:

1. Should all circumstances flexibly and equitably be considered when determining "excusable neglect" for filing notice of appeal within 60 but over 30 days from judgment?

2. Should the aggregate combination or totality of all relevant circumstances be considered in an "excusable neglect" determination?

3. Is certiorari warranted when the decisions from the lower courts conflict with the prior decisions of this Court and of other circuits regarding the definition of "excusable neglect"?

4. Should the four *Dix* factors cited in *Pioneer*, only be considered in a negative sense, i.e., only against movant, or should they be considered in favor of granting an extension when they are not negative?

5. The circuit courts define and apply "excusable neglect" under Fed. R. App. P. 4(a)(5) differently. Should the determination be flexible and should all factors be considered including the equity and prejudice to petitioners, particularly when the cause of action in issue is of extreme constitutional importance.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Wyoming Outfitters Association, the only corporate petitioner, has no corporate parents and no publicly held company owns 10% or more of its stock.

PARTIES TO THE PROCEEDING

The petitioners in this case are the following: WYOMING OUTFITTERS ASSOCIATION, INC., doing business as Wyoming Outfitters and Guides Association; Jim Allen; Tim Trefren; John Winter; Bobbi Wade; Vince Van Roegen; Kim R. Carrara; Walter Lee Jones; Craig Artman; and Eric Larsen.

The respondents in this case are the following: Wyoming Game and Fish Commission members Hal Corbett; Les Henderson; Tracy Hunt; L. Gary Lundvall; J. Michael Powers; Mike Munzie; Dave Steger; and John Baughman, Director.

Wyoming Wildlife Federation, an intervenor in the courts below, is also being served as a respondent.

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Petitioners respectfully petition for a writ of certiorari to review the judgments of the Federal district court of Wyoming and United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A at 1a) is reported at 2001 WL 1176390 (10th Cir. (Wyo.) Oct. 05, 2001). The district court's opinion and order denying the petitioners' Motion for Extension of Time to File Notice of Appeal is unreported (Appendix B at 6a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 5, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rules of Appellate Procedure 4(a)(1) and 4(a)(5). (Appendix C).

STATEMENT OF THE CASE

This petition should be granted to resolve a conflict between the Tenth Circuit's decision which denied the petitioners' motion for extending the time to file a notice of appeal and this Court's decision in *Pioneer*. The Tenth Circuit failed to apply a flexible "excusable neglect" standard as articulated in *Pioneer* by failing to consider all the circumstances or the totality of circumstances in aggregate justifying the requested extensions pursuant to Fed. R. App. P. 4(a)(1) and 4(a)(5). The Tenth Circuit ruled that the district court did not abuse its discretion when it denied the appellant's request for an extension by finding that petitioners

did not make a showing of "excusable neglect" or "good cause" as required by Fed. R. App. P. 4(a)(5). Both lower courts applied the four factors set forth in *Pioneer* only a negative manner without attributing any weight to them in favoring a finding of excusable neglect. Both courts neglected to consider all the circumstances. Neither court applied the *Pioneer* flexibly or considered the equity to petitioners or the national importance of resolving the underlying constitutional issues.

A. Background

Petitioners are the corporate Wyoming Outfitters Association, four outfitters that nationally market hunting services to nonresident hunters and five nonresident hunters that booked with those outfitters but they could not draw elk or deer licenses in Wyoming because of its system that greatly limits elk and deer licenses issued to nonresidents, while no such limits are placed on residents. The Wyoming Wildlife Federation intervened on behalf of resident hunters. Respondents are Wyoming's Game and Fish Commissioners and the Department Director. Petitioners, in their original complaint to the district court, were seeking declaratory and injunctive relief from the discriminatory elk and deer licensing allocation system in the State of Wyoming. Petitioners complained that the allocation of hunting licenses was unconstitutional under the Dormant Commerce Clause because it employed a separate method of issuing hunting licenses to nonresident hunters and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The respondents claimed and the district court incorrectly held that the State "owned" game animals, that the outfitters and their Association had no standing, and that the Dormant Commerce Clause had no application to discrimination against the interstate hunting industry.

The original case was filed in the district court of Wyoming on June 16, 1998. Respondents filed a Motion for Summary

Judgment and a Motion to Dismiss for lack of standing and plaintiffs filed a cross Motion for Summary Judgment. The hearing was held on April 16, 1999. The district court issued the Order, dated September 18, 2000, nearly 18 months later, granting the state's Motion to Dismiss and Motion for Summary Judgment. Petitioners simultaneously filed a Notice of Appeal and Request for Extension of Time more than 30 days after the Judgment, but within the 60 day time period provided expressly by Fed. R. App. P. 4(a)(5). The district court denied the request by stating that petitioners' failure to comply with the 30 day deadline of Fed. R. App. P. 4(a)(5) was not the result of "excusable neglect". On appeal, the Tenth Circuit affirmed the district court's decision as not being an abuse of discretion.

B. Simultaneous circumstances that contributed to the need for an extension of time.

1. Petitioners' counsel's automobile accident. A few months before the case was filed in the district court of Wyoming, petitioners' counsel suffered a near fatal vehicle collision in which he was thrown from a vehicle and sustained multiple, severe and disabling injuries. After the case was filed in June of 1998 and before the district court issued its decision in September of 2000, petitioners' counsel had to undergo multiple surgeries and on the very date his office received the trial court order of dismissal he had begun extensive daily physical therapy treatment taking most of each day in order to partially regain the use of his extremities and physical function. Timely initiation of such therapy was critical to his health and coincided exactly on the day his office received the district court's order, without warning, 18 months after the matter was heard. Counsel did not receive the district court's Judgment until September 25, 2000, a week after it was signed. Neither the District Judge or the Tenth Circuit gave any consideration to the fact that counsel received that Judgment one week late.

2. Separation of law practice and loss of all secretarial support. Eighteen months passed between the hearing and the receipt of the original decision appealed. During that time, counsel separated from the original law firm and from all the specialist attorneys that had worked on the case from its origin.

The secretarial staff that was responsible for tracking and knowing the whereabouts of the individual petitioners, the board members of the outfitters association and who maintained the many boxes of files, had departed leaving the counsel alone to deal with dozens of boxes of the case. During the next three weeks, counsel searched for and hired several temporary secretaries but none even had the required minimal competence. There was a region wide, legal secretary shortage even of temporaries. At the time the district court's order arrived at counsel's office, he was struggling to hire a secretary while himself undergoing extensive, daily physical therapy which took up most of each day. Most critically, when he did find a secretary, that secretary was hospitalized as an unidentified person in a comatose condition due to a medical emergency the last part of the very week the notice of appeal was due. Counsel had no explanation of her absence or knowledge of her whereabouts or if she had furnished the completed Notice of Appeal to local co-counsel for his co-signature and for filling in the State of Wyoming.

3. Difficulty in reaching petitioners concerning the decision for the appeal. As a first matter, in order to file the Notice of Appeal, petitioners' counsel had to consult with the outfitters and board members to get their authority to appeal in light of the unexpected negative decision, and the court's complex reasoning and the public ridicule petitioners had received in the media throughout the case. Communication proved impossible for several reasons.

The individual outfitters as well as the Executive Committee Board members of the Association were the first challenge. They were entering their second hunting season following the final hearing (after 18 months) at which the judge himself told them in open court he would render an opinion within one to two weeks and implied to them that they had won their case. During that 18 month period, there was rumor after rumor that there was a decision and that they had prevailed. They had all but stopped believing and responding to rumored decisions. Worse, when the decision was rendered, but before it was received by counsel, a newspaper reporter called all the individuals that he knew, including undersigned counsel, with another rumor that there was a decision this time and that it was favorable! Though most of the outfitters and Board Members were deep in different National Wilderness Areas in Wyoming and Montana, some disregarding rumors and others believing that they had won, counsel had to locate and contact each of them, get them a copy of the 75 page decision, confer with each one of them, and finally schedule a Board meeting with a quorum. This also had to be accomplished with the petitioner nonresident hunting clients in 5 different parts of the U.S.A. during the same period. The first possible board conference was the week the appeal notice was due, but it fell through for lack of a quorum.

4. Petitioners' counsel's solo and pro bono law practice. All the aforementioned events, including the inability to reach the outfitters and board members for a quorum, the intensive daily physical therapy that the counsel was undergoing and the turmoil in the counsel's turnover in staff assistants, occurred while the counsel was a solo practitioner specializing in a pro bono conservation practice for the public good. His practice was dedicated and devoted to public service. His busy practice had the highest pro bono volume of its kind. Due to his injuries and his dedication to pro bono services, his net income was zero during the entire period the case was in litigation.

5. Important factors not considered by the lower courts. The lower courts abused their discretion by not considering, or even mentioning, additional simultaneous factors that caused the delay and merited an extension.

The lower courts gave no consideration whatsoever to the following facts:

1. Delay in receipt of Judgment. Petitioners' counsel did not receive the 75 page decision for a week. The afternoon it was received in counsel's office across the U.S.A., counsel was at his doctor's and then in physical therapy the whole day.

2.

a) Before the decision was actually received and reviewed, a newspaper reporter misled counsel and many of the petitioners to believe it was a decision favorable to them.

b) Many misinformed petitioners were deep in National Wilderness Areas in Wyoming with no concern because they thought they had won, others did not believe another rumored decision because of the many earlier false rumors that judgment had finally been rendered over the course of 18 months.

c) The petitioners, after 18 months and many rumored judgments, had no expectations of a judgment thus could not timely be contacted.

3. To counsel's predicament of not being able to get a board meeting quorum under the above circumstances, such as the Executive Committee members being in remote wilderness not expecting a decision after the passage of two hunting seasons over a 18 month wait and/or believing they had won.

4. To counsel's professional obligation to get his clients' authority prior to filing an appeal of the district court's decision that rested on factual findings wholly unexpected by all petitioners.

5. To counsel's need for extra time at the tail-end of the 30 day period, because of his location in a distant state and city and the need to get local counsel to also co-sign the notice to appeal then to get it 500 miles across Wyoming.

6. To the specific fact that counsel lost both of his legal secretaries during the 30 day period and then his new trainee secretary who was thought to have filed the notice and who *unexpectedly* disappeared the last few days before the 30 day period expired. After the period expired, she called from a hospital where she had been emergency admitted and had been comatose as an "unknown" person – ironically one of the many hospitals counsel had called to locate her by name.

7. Though the Tenth Circuit held that the district court considered all the facts in aggregate, a reading of the district court's decision (Appendix B) demonstrates that neither court considered all the extraordinary circumstances and the trial court did not even consider the total effect of them occurring in aggregate, i.e., simultaneously.

8. No consideration was given to the *Code* of Professionalism obligation of opposing attorneys in fairness not to oppose justified requests for extensions of time.

9. Counsel had no expectations or anticipation that all the extraordinary circumstances would come together

simultaneously in the last few days before the Notice had to be lodged out-of-state, even to the fact that he himself would still be in physical therapy the better part of most days.

10. No consideration was given to the prejudice to petitioners/respondents, to the importance of the Constitutional issues, or to the impact to the judiciary when the denial of the request to file after the passage of 30 but before 60 days unnecessarily makes more litigation necessary to resolve the same important Constitutional issues that are left unresolved instead of concluding the issue.

C. Initial Proceedings in the District Court

The district court complaint was seeking declaratory and injunctive relief from the discriminatory elk and deer licensing allocation system in Wyoming. Petitioners complained that the allocation of hunting licenses was unconstitutional since it violated the Dormant Commerce Clause by employing a separate, discriminatory method of issuing hunting licenses to nonresident hunters and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The original case was filed in the district court of Wyoming on June 16, 1998. Respondents filed a Motion for Summary Judgment and a Motion to Dismiss for lack of standing and plaintiffs filed a cross Motion for Summary Judgment. The district court rendered an Order, dated September 18, 2000 but not received by counsel until one week after it was rendered, granting the state's Motion to Dismiss for lack of standing and Summary Judgment motions that the Dormant Commerce Clause did not extend to state owned game animals and that admitted discrimination against non-residents did not violate the Equal Protection Clause because the State should prefer its

own citizens that owned the game to assure their support. The district court did not address the petitioners' Equal Protection argument that was not an independent or a legitimate rational for discrimination. Petitioners filed a Notice of Appeal and Request for Extension of Time, simultaneously, more than 30 days after the Judgment, but within the 60 day time period as provided by Fed. R. App. P. 4(a)(5). The district court denied the Request on the grounds that the delay was not the result of "excusable neglect" as required by Fed. R. App. P. 4(a)(5) but did not analyze some of the factors and did not consider all of the circumstances by not weighing any of them or by not considering the aggregate effect of all of them combined. *See generally Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (1993).

D. The Tenth Circuit's Decision

The Tenth Circuit affirmed the district court's judgment by paying lipservice to *Pioneer.* It limited its review to "abuse of discretion". The Tenth Circuit acknowledged the rule articulated by the Supreme Court in *Pioneer*, by stating that "in determining what constitutes excusable neglect, a court must tak[e] account of *all* relevant circumstances surrounding the party's omission". (Emphasis added). *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498. Though the holding in *Pioneer* stands for the proposition that "excusable neglect" is at bottom an equitable determination and *all* relevant circumstances must be taken into account, the Tenth Circuit affirmed the lower court's decision thereby repeating its errors. *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498. The Tenth Circuit, briefly, referred to the petitioners' counsel's painful physical therapy, pro bono practice, contemporaneous upheaval in his law practice and the inability to reach his clients. (Appendix A at 4a). Then the Circuit Court incorrectly ruled that the district court had considered all the circumstances in aggregate before finding that there was no manifest error. The Tenth Circuit did not cite a page or point where the analysis

appeared in the district court's decision for it could not. Neither court considered all the circumstances much less considered them in aggregate or their combined effect as they occurred simultaneously.

The Tenth Circuit failed to apply the rule expressed in *Pioneer* that "excusable neglect" is an "elastic concept", meaning that it could be easily expanded. *Pioneer*, 507 U.S. at 392, 113 S. Ct. at 1496. Like the district court, the Tenth Circuit failed to take into account, although it stated otherwise, that all circumstances were not considered either separately or in "aggregate". Despite the fact that many cases predating *Pioneer* had held that circumstances like those in this case standing separate and alone had warranted a grant of an extension of time, the trial court in this case had inflexibly applied the rule.

Nor did the Tenth Circuit considered itself bound to the analysis of the four factors that the Supreme Court iterated in *Pioneer,* namely, an analysis into the danger of prejudice to the other party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith. *See* Appendix A at 3a. *See also Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498 (citing *In re Pioneer Investment Services Co.*, 943 F.2d at 677). Although the Tenth Circuit mentioned these four factors, it did not engage in a complete analysis in order to illustrate its decision to affirm the district court's denial to the extension of time. It did not treat the favorable factors favorably. Instead, like the district court, it disregarded them and only weighted those that it perceived as not favoring movant. It even ignored substantive circumstances that should have warranted an extension by themselves in its analysis, just as the district court did.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons.

First, the Tenth Circuit's judgment, as a practical matter, directly conflicts with this Court's decision in *Pioneer* since it applied a different, inflexible "excusable neglect" test or standard. According to the holding in *Pioneer*, the determination is an equitable one, taking account of *all* relevant circumstances including "inadvertence, miscalculation or negligence". *Pioneer*, 507 U.S. at 388, 113 S. Ct. at 1494. The district court and the Tenth Circuit failed to fully examine the reasons for the delayed filing. They did not apply any equitable principles of "flexibility" and "elasticity". Review should be granted in order to prevent this irreversible, nationwide harm to many attorneys and to their clients when a delayed filing, although the result of "excusable neglect", results in the rejection of the notice of appeal since the courts inconsistently apply the elastic concept and the equitable principles expressed in *Pioneer.*

Second, both of the lower courts failed to consider and to take into account all relevant circumstances. Although the Tenth Circuit mentioned briefly the four factors that a court must examine in its analysis of "excusable neglect", the court failed to examine each factor separately and individually as dictated by *Pioneer.* Here, the court failed to examine and to rule upon each factor, namely, the danger of prejudice to the nonmoving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Both lower courts should have applied the *Pioneer* principles equitably by separately considering each reason alone, then all in aggregate.

Third, there remains a substantial conflict between Circuits on how to apply *Pioneer* and interpret Fed. R. App. P. 4(a).

For example, the Fifth Circuit treats ineffective assistance of counsel as "excusable neglect" in obvious consideration of equity and the prejudicial impact. *See generally United States v. Clark*, 193 F.3d 845 (5th Cir. 1999). In *Clark*, the court found it was "excusable neglect" when counsel failed, in good faith, to file timely because he erroneously thought that he had a longer time period. In our case, the district court did not even consider the plight of the plaintiff when counsel neglected to file timely for far better reasons.

I. COURTS ARE APPLYING THE INCORRECT "EXCUSABLE NEGLECT" STANDARD THAT CONFLICTS WITH THIS COURT'S DECISION IN PIONEER. WHILE PAYING LIP SERVICE TO *PIONEER*, THEY ARE NOT APPLYING THE TEST EQUITABLY AND FLEXIBLY.

In startling conflict with *Pioneer*, both lower courts have virtually reinterpreted *Pioneer* and have eliminated the elastic and equitable principles expressed in this Court's opinion. Both lower courts examined *some* of the reasons for the delayed filing but failed to apply any flexibility before rendering their decisions. The *Pioneer* Court stated that inadvertence, miscalculation, or negligence all may constitute good cause for failing to comply with a court-ordered bar date for filing proofs of claim. *Pioneer*, 507 U.S. at 388, 113 S. Ct. at 1494.

Inadvertence is defined as lack of attention, carelessness, or failure of a person to pay careful and prudent attention to the progress of a negotiation or a proceeding in court by which his rights may be affected. Black's Law Dictionary 759 (6th ed. 1990).

Both lower courts totally disregarded any evidence of "inadvertence" on counsel's part when it came to the late filing. One of the contributing reasons for not timely filing for an

extension of time was the fact that counsel was accustomed to practicing in cases where the appeal time was 60 days such as in cases against the United States Government instead of State government and in jurisdictions where the Code of Professionalism provided that opposing counsel should consent to extensions of time in fairness and professional courtesy to each other. That was weighted against the granting of an extension in this case instead in favor of an extension as in *Clark*, supra.

Combined with the concurrent upheaval of his legal practice and the other factors, as explained below in further detail, the counsel in this case acted in reliance and dependence upon the Code of Professionalism and incorrectly assumed that the court would recognize any resultant shortcomings and consider all relevant factors when by applying the flexible "excusable neglect" standard.

"Miscalculation" is defined as the opposite of calculation or lack of applying studied care in analyzing or planning. Webster's Ninth New Collegiate Dictionary 196 (1990) [defining the term *calculation* and page 758, defining the prefix *mis*]. Again, this Court has stated that "miscalculation" may constitute good cause for untimely filing of a claim. *Pioneer*, 507 U.S. at 388, 113 S. Ct. at 1494. The analyses of both lower courts in our case, totally disregarded the fact that there were many simultaneous factors that contributed to the late filing that created a general sense of timing that later proved to be a "miscalculation".

By the time the district court reached its decision (18 months after hearing), the most important petitioners and representatives of the corporate defendants were not immediately available. Since most are outfitters that operate wilderness camps, communicating the seventy-five (75) page decision and court opinion proved to be very difficult. It proved to be impossible to reach the necessary members of the Board within

time, in order to get a quorum, or to get the decision to each member and the relevant voluminous documents to consider in this complex case. Even assuming that the petitioners' lack of availability and their presence in true wilderness constituted a miscalculation of the schedule on everyone's part, the lower courts totally disregarded any such "miscalculations" in a positive light and failed to apply the "elastic concept" as expressed in *Pioneer.* The lower courts failed to consider the fact that the petitioners were not ordinary citizens employed according to a regular schedule or that they were far removed from society when the very late decision from the district court was finally made, since the petitioners were absent in true wilderness preparing their camps for the hunting season. The lower courts failed to consider the reasons for the petitioners' absence and stated that such communication problems did not provide a basis for "excusable neglect". The lower courts failed to consider that plaintiffs belonged to a special class of citizens and erred by not applying the "elastic concept" as expressed in *Pioneer.*

"The ordinary meaning of 'neglect' is to 'give little attention' to a matter, or, 'to leave undone or unattended to *especially through carelessness*'." *Pioneer*, 507 U.S. at 388, 113 S. Ct. at 1494 (citing Webster's Ninth New Collegiate Dictionary 791 (1983)). *Pioneer* held that such excusable neglect encompasses both "*simple*, faultless omissions to act and, more commonly, omissions caused by *carelessness*". *Id.* (Emphasis added).

During the 18 month time period that everyone was awaiting the district court's decision, counsel had separated from all of the attorneys from the original law firm. His secretarial staff had departed leaving counsel alone to deal with dozens of boxes of files. All efforts of counsel to hire a legal secretary proved fruitless because of an extraordinary labor shortage. By the time the district court's order arrived at the counsel's office, he was struggling to hire a legal secretary while undergoing extensive daily physical therapy as a result of his automobile accident.

No consideration was given by the lower courts to the fact that the district court's 75 page decision was not received until a week after its rendition and that counsel's one and only legal secretary was emergency admitted to a hospital and then transferred to ICU as an unidentified person the very week the notice of appeal was due or to the fact that counsel himself maintained his practice out of state and the petitioners were nonresidents that resided across the U.S.A. and all of the special circumstances arising from these particular and unique facts.

In *Pioneer*, this Court stated that Congress, by empowering the courts to accept late filings "where the failure to act was the result of 'excusable neglect', plainly contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake or carelessness *as well as* by intervening circumstances beyond the party's control". *Id.* (Emphasis added). Herein, both lower courts should have held that there was sufficient reason for the existence of "excusable neglect".

The lower courts, however, erred by not examining all the reasons for the delayed filing of notice under the standard expressed in *Pioneer.* Had they done so, then they would have applied the equitable and flexible principles and rules of *Pioneer*. Here, the lower courts treated inadvertence, miscalculation and neglect against respondent. They applied a more stringent opposite standard. Even thought the courts would like to lead us to believe that their rulings were based on the *Pioneer* flexible and elastic standard, the simplest examination of the rulings reveals that the lower courts applied, instead, the more rigid standard of requiring all extraordinary circumstances to be all beyond counsel's control.

The "extraordinary circumstances" term is defined as the *out of the ordinary factors* (Black's Law Dictionary 586 (6th ed. 1990) (emphasis added). A detailed review of the courts' decisions reveals that the courts were only paying lipservice to

Pioneer by not looking for out-of-the-ordinary factors, in their "excusable neglect" determination. The lower courts' decisions rest upon only some of the reasons for the delayed filing, misapplied the flexible, elastic and equitable concepts expressed in *Pioneer*, and instead, and contrary to *Pioneer*, they evaluated such circumstances under a very strict, rigid, inflexible and inequitable standard; that of all "extraordinary circumstances" being outside of the control of counsel.

II. BOTH UNDERLYING DECISIONS THAT THE LATE FILING OF A NOTICE OF APPEAL BY THE PETITIONERS' COUNSEL WAS NOT ATTRIBUTED TO "EXCUSABLE NEGLECT" FAILED TO TAKE INTO ACCOUNT ALL THE CIRCUMSTANCES OR THE AGGREGATE EFFECT OF ALL RELEVANT CIRCUMSTANCES JUSTIFYING THE REQUESTED EXTENSION.

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, [not exclusively], the danger of prejudice to the debtor [the nonmoving party], the length of the delay and its potential impact on judicial proceedings [not excluding consideration that denial may also have an impact on movants], the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer, 507 U.S. at 395, 113 S. Ct. at 1498 (citing *In re Pioneer Investment Services Co.*, 943 F.2d 673, 677 (1991)).

A simple examination of the lower courts' decisions reveals that they broadly mentioned these four nonexclusive *Pioneer* factors that must be considered.

A. Both lower courts failed to treat the lack of prejudice as a result of the delayed filing as a *positive factor* in favor of an extension of time.

The danger of prejudice to a proceeding must be both clear (material) and present (substantially likely). *See Gentile v. Nevada*, 501 U.S. 1030, 1037, 111 S. Ct. 2720, 2725 (1991) (quoting G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 397 (1985)). The substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger. *See Gentile*, 501 U.S. at 1037, 111 S. Ct. 2725 (citing *In re Hinds*, 90 N.J. 604, 662, 449 A.2d 483, 493 (1982)).

This Court, in its *Pioneer* decision, concluded that the determination of "excusable neglect" was an equitable one and that the danger of prejudice to the nonmoving party should be considered when taking into account of all relevant circumstances. *Pioneer*, 507 U.S. at 394, 113 S. Ct. at 1498.

In another remarkable instance of paying lipservice to *Pioneer*, both courts in this case cite this important criterion but held that there was no prejudice but then discounted it i.e., gave it no favorable weight. The district court ruled there was no such prejudice in this case but both lower courts neglected to consider this factor as *favoring* an extension. Moreover no consideration was given to the prejudice to the movants.

B. Both lower courts failed to treat the fact that the delay did not have a negative impact on the judicial proceedings as a positive finding favoring petitioners. They also failed to consider the impact of denying the requested extension of time.

The determination of "excusable neglect" is an equitable one, taking account of all relevant circumstances surrounding the party's omission, including the length of the delay and its potential impact on judicial proceedings. *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498.

According to *Pioneer*, during this or during any other Court's analysis for the presence of "excusable neglect", consideration must be given to the length of the delay. *Id.* In our case, the Tenth Circuit, however, failed to consider that the length of the delay for the filing of the notice of the appeal was very minimal, a fact that was readily acknowledged by the district court, which, in its decision, held that the delay was minimal and would not negatively impact the judicial proceedings. *Pioneer* dictated that examination into these two factors was critical and that it was required since they both constituted prongs in the equitable analysis of "'excusable neglect' when *taking account of all relevant circumstances.*" *Id.*

The petitioners had waited for nearly 18 months for the district court's decision. The notice of appeal was filed late in part due to the week it took to even get that court's decision once it was rendered. Taking account of all relevant circumstances, including the absence of the petitioners who were in the real wilderness, other locations of petitioners domiciled across the U.S.A., the separation of petitioners' counsel's legal practice and his required lengthy daily physical therapy sessions, the emergency hospitalization and ICU transfer of the one and only remaining new secretary the last of the week the notice

was due, any court, applying equitable principles as expressed in *Pioneer*, should have concluded that the delay was minimal and that the subsequent judicial proceeding could not be impacted negatively, especially when a decision was rendered by the district court after eighteen months of waiting. If nothing else, that was an abuse of discretion.

Both lower courts failed to treat the absence of an impact on the judiciary as a positive finding favoring an extension.

C. Both lower courts failed to consider *all* the facts and circumstances presented for the delayed filing and which were outside the reasonable control of the petitioners' counsel.

The determination of "excusable neglect" is an equitable one, taking account of all relevant circumstances surrounding the party's omission, including whether it was within the reasonable control of the movant. *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498.

Again, according to *Pioneer*, the court must examine, during its analysis for the presence of "excusable neglect", at least four factors, including whether the delay was within the reasonable control of the movant. *Id.* "Control" is not alone a singular determinative consideration. Regardless, the circumstances were not within the "reasonable control" of movant so the court erred when it held that it had to be out of the control of counsel and when it held that the circumstances were not out of his control. In this case the trial court would not consider any circumstances unless the court thought it very clearly was beyond the control of the movant.

The petitioners waited for eighteen months for the decision to be rendered by the district court. Since the petitioners were hunting outfitters, they were in the wilderness at the time the

decision was rendered and their counsel was under obligation to consult with them regarding the filing of an appeal. The district court's statement that counsel should have filed notice anyway, itself was an abuse of discretion. The fact that the plaintiffs were not immediately available was beyond counsel's control, especially when one considers that the parties had waited an extraordinary period of 18 months for the district court's decision that the Judge had originally promised within 2 weeks.

In addition, counsel's physical therapy sessions were beyond his reasonable control. Common sense dictates that medical attention is provided at the time needed. It should not be postponed or rescheduled. As a result, counsel had to attend these lengthy daily physical therapy sessions. This factor contributed to the late filing.

In *Pioneer*, the Court gave little wait to the fact that the counsel was experiencing upheaval in his law practice at the time of the bar date but the circumstances here were far worse. *Pioneer*, 507 U.S. at 398, 113 S. Ct. at 1499. The Court however, did not discount that such a factor could not be considered in the determination of "excusable neglect" when considering all relevant circumstances including whether the party's omission was within the reasonable control of the movant.

The Tenth Circuit, in its decision, failed to analyze each of the reasons for the delayed filing and if each one was within the movant's reasonable control or not. And that is contrary to the holding of *Pioneer.* The Tenth Circuit, since it would like us to believe that it followed *Pioneer*, should have examined each reason and factor and should have presented why each one was within or outside the movant's control. The Tenth Circuit's decision is totally silent on this issue.

Counsel's secretary's disappearance occurred in the latter part of the week the notice was due to be filed across the country.

Her disappearance, emergency hospitalizations and the transfer to ICU as an "unnamed person", comatose and dying was all beyond counsel's control. Nevertheless the lower courts held that nothing was beyond counsel's control.

D. Both lower courts recognized that the petitioners' counsel acted in good faith in filing the notice of appeal late but failed to treat it as a *positive factor* to be weighted in favor of the requested extension of time.

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage. Black's Law Dictionary 693 (6th ed. 1990) (citing *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259, 260 (1954)).

In our case, petitioners' counsel presented ample evidence to the district court in order to support his claim, that he attempted, in good faith, to file the notice of appeal on time but failed to do so despite all his efforts. There is no indication on the record, whatsoever, that the counsel's actions were designed to defraud or to gain an advantage on the other parties. The counsel made more than a reasonable effort to reach the plaintiffs while they were absent in the wilderness. In good faith, again, he tried to hire legal staff to assist him. When one was hired, then she disappeared due to life threatening illness. And all the efforts were made while he was undergoing lengthy daily painful physical therapy.

The district court correctly held there wasn't bad faith in this case. The Tenth Circuit's decision also correctly refers to the fact that as part of the examination of what constitutes "excusable neglect", a court must take account of all relevant circumstances surrounding the party's omission, including

whether the movant acted in good faith. (Appendix A at 3a) (citing *Pioneer*, 507 U.S. at 395). Once more, here, the Tenth Circuit paid lipservice to *Pioneer* by mentioning the "good faith" criterion, but completely failing to treat it as a favorable finding supporting the granting of an extension of time. Both lower courts found that counsel's good faith was not in issue. They then falsely disregarded that consideration instead of treating it as a factor as favoring the granting of an extension of time. Thus, neither court correctly applied the *Pioneer* rule.

III. THE LOWER COURTS' DECISIONS HOLDING THAT THE LATE FILING OF A NOTICE OF APPEAL BY THE PETITIONERS' COUNSEL WAS NOT ATTRIBUTED TO "EXCUSABLE NEGLECT", INFLEXIBLY APPLIED THE WRONG STANDARD AND ANALYSIS, WHICH CONFLICTS WITH *PIONEER* WHICH MISAPPLICATION IS ALL TOO COMMON.

Both lower courts holdings conflict with the concept and application of "excusable neglect" set forth in *Pioneer* and some Circuits. Other Circuits have held that "ineffective assistance" of counsel when counsel only was mistaken as to the length of time for filing a notice of appeal constitutes "excusable neglect". *United States v. Clark*, 193 F.3d 845 (5th Cir. 1999). In this case, neither court gave any consideration to the equitable plight of the petitioners or the important constitutional issues prejudiced by the denial of the motion for extension.

In *Clark*, the defendant alleged that he had demonstrated "excusable neglect" because his attorney failed to file his appeal on time. *Id.* at 846. The Fifth Circuit examined the holdings of *Pioneer* and ruled that the attorney's failure to file, in good faith (treating it as a positive consideration as well as a negative one), notice of appeal pursuant to defendant's request *would be ineffective assistance of counsel and would thus constitute "excusable neglect" for filing of untimely appeal. Id.* at 847.

In our case, one of petitioners' counsel's reasons for needing an extension of time was his sense of timing due to being accustomed to 60 day periods and the fact that he received the decision late from the trial court. The Tenth Circuit, however, totally disregarded this fact. Here, by applying *Clark,* the reason for the delay by the petitioner's counsel, *standing on its own*, should have provided the reason for "excusable neglect" (even if we were to disregard the totality of the other circumstances as examined in the previous sections). In this case no consideration was given to the prejudice against petitioners considered in *Clark* nor was "good faith" treated as a positive finding weighting in favor of movant.

Other circuits, however, by applying *Pioneer*, have ruled that attorney's mistakes in filing notices after the deadline had not amounted to "excusable neglect". *See Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994) (where after interpreting *Pioneer*, the court ruled that even though the counsel had demonstrated professional incompetence, such factor did not support a finding of excusable neglect). In other instances, courts have remanded the case to the district courts in order to determine the issue of "excusable neglect" according to the standard announced in *Pioneer. See United States v. Clark*, 51 F.3d 42 (5th Cir. 1995) (where the notice of appeal was untimely filed, where the court recognized the flexibility of *Pioneer* and where the circuit court remanded the case to the district court to consider the case of "excusable neglect" under the standard announced in *Pioneer*).

In our case, both lower courts' decisions rejected the elastic principles of *Pioneer* and *Clark* and did so in a manner that brought their decision into direct conflict with other circuits, one of which applied correctly the principles of determining "excusable neglect".

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED OCTOBER 5, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 00-8066 & 00-8078
(D.C. No. 98-CV-1027-J)
(D. Wyo.)

WYOMING OUTFITTERS ASSOCIATION, doing business as Wyoming Outfitters and Guides Association; JIM ALLEN; TIM TREFREN; JOHN WINTER; BOBBI WADE; VINCE VAN ROEGEN; KIM R. CARRARA; WALTER LEE JONES; CRAIG ARTMAN; ERIC LARSEN,

Plaintiffs-Appellants,

v.

WYOMING GAME AND FISH COMMISSION; HAL CORBETT; LES HENDERSON; TRACY HUNT; L. GARY LUNDVALL; J. MICHAEL POWERS; MIKE MUNZIE; DAVE STEGER; JOHN BAUGHMAN,

Defendants-Appellees,

WYOMING WILDLIFE FEDERATION,

Intervenor-Appellee.

Appendix A

ORDER AND JUDGMENT*

Before **HENRY**, **PORFILIO**, and **MURPHY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Plaintiffs challenge Wyoming's hunting licensing system under various provisions of the federal constitution. On July 5, 2000, the district court entered summary judgment in favor of the state. Under Fed. R. App. P. 4(a)(1)(A), plaintiffs had until August 5, 2000 to file a notice of appeal. By the close of business on August 5, no such notice had been filed.

More than two weeks later, on August 22, 2000, plaintiffs filed a notice of appeal accompanied by a motion for an extension of time. After a hearing on the motion, the district court denied the request for an extension, finding that plaintiffs did not make a showing of "excusable neglect" as required by Fed. R.App. P. 4(a)(5) (allowing a district court to extend the time to file a notice of appeal, provided the party so moves within thirty days after the notice was due

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

and shows excusable neglect or good cause). Plaintiffs appeal. We affirm.[1]

The Supreme Court has directed that in determining what constitutes excusable neglect, a court must "tak[e] account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993). The Court has pointed to four factors that are relevant in determining whether to find excusable neglect: 1) the danger of unfair prejudice to the nonmoving party; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and 4) whether the movant acted in good faith. *Id.*; *see City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994).

We review the district court's determination of the presence or absence of excusable neglect based on an abuse of discretion. *City of Chanute*, 31 F.3d at 1046. "The real question here is not whether we would have found . . . excusable neglect but rather whether we should second-guess the trial judge's decision . . . ." *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1564 (7th Cir. 1990) (per curiam) (en banc).

Based on the record before us, we find nothing to suggest that the district court abused its discretion. Renewing the

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1. The notice of appeal stemming from the underlying appeal is docketed as No. 00-8066. Plaintiffs' appeal from the district court's denial of the motion for an extension of time is docketed at No. 00-8078. This court consolidated the appeals for purposes of briefing.

arguments he pressed in his motion for an extension of time, plaintiffs' counsel first states that in the month following the district court's grant of summary judgment, counsel was in the midst of a rigorous treatment of physical therapy. The treatment was necessary as a result of injuries counsel sustained in a 1999 car accident. We have no doubt that the treatment was painful and time-consuming, but we agree with the district court that counsel was not so physically or mentally disabled that he was unable to file the notice of appeal. We note in particular that counsel was apparently able to perform various duties related to his extensive pro bono practice, yet was unable, he says, to file a notice of appeal in this case.

Similarly, we reject counsel's invitation to excuse his untimely notice of appeal in recognition of his impressive pro bono commitment. While it is no doubt important for lawyers to engage in public service, we have never intimated that a deadline, especially one as significant as that contained in Fed. R. App. P. 4(a), can be excused merely because the offending lawyer has a laudable pro bono practice. Finally, we agree with the district court that the difficulties related to counsel's inability to secure competent secretarial service, the upheaval caused by his withdrawal from his former law firm, and the communication problems posed by his clients' treks into the wilderness do not provide, either alone or in the aggregate, a basis for a finding of excusable neglect.

Because we conclude that the district court did not abuse its discretion in denying plaintiffs' request for an extension of time, we lack appellate jurisdiction to reach the merits of the underlying appeal. We therefore DISMISS appeal No.

00-8066; with respect to appeal No. 00-8078, we AFFIRM the order of the district court denying plaintiffs' motion for an extension of time.

Entered for the Court

John C. Porfilio
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING DENYING PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL DATED AND FILED SEPTEMBER 18, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 98-CV-1027-J

THE WYOMING OUTFITTERS ASSOCIATION (W.O.A., INC.) d/b/a THE WYOMING OUTFITTERS AND GUIDES ASSOCIATION, JIM ALLEN, TIM TREFREN, JOHN WINTER, BOBBIE WADE, VINCE VAN ROEGEN, KIM R. CARRARA, WALTER LEE JONES, CRAIG ARTMAN, and ERIC LARSEN,

Plaintiffs,

v.

HAL CORBETT, LES HENDERSON, TRACY HUNT, L. GARRY LUNDVALL, J. MICHAEL POWERS, MIKE HUNZIE, DAVE STEGER and JOHN BAUGHMAN,

Defendants.

ORDER DENYING PLAINTIFFS', THE WYOMING OUTFITTERS ASSOCIATION, MOTION FOR EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL

Appendix B

Plaintiff Wyoming Outfitters Association's Motion for an extension of time in which to file notice of appeal, and defendants' response in opposition thereto, came before the Court for hearing by telephone on September 12, 2000. Grover C. Dahn and John J. Jackson, III, appeared on behalf of plaintiffs; Lynda Cook appeared on behalf of defense; and Don Miller appeared on behalf of the intervenors in the case. The Court has considered the motion, the affidavit and supporting material, the memoranda, the arguments of counsel at the hearing, the applicable law, and being fully advised, finds that the plaintiff's motion for an extension of time in which to file notice of appeal should be denied for the reasons set forth below.

BACKGROUND

A judgment that plaintiff recover nothing of defendants and that all parties bear their own costs and attorney's fees was rendered on July 5, 2000. On August 22, plaintiff petitioned this Court for an extension of time to file an appeal. The reasons, as set forth in counsel's argument at the hearing and his affidavit, are primarily based on health issues, inability to contact individual plaintiffs who were out of town, lack of office support, and his failure to appreciate that the time was passing.[1]

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1. Mr. Jackson has provided this Court with very little supporting documentation of his reasons for the delay. The materials that were attached to his affidavit include a copy of the prescription for physical therapy, receipts and bill for his July 11, 2000 visit to the orthopedic surgeon, and some communication between himself and co-counsel.

Appendix B

Mr. Jackson, counsel for the plaintiffs, was in a car accident in November 1999. Affidavit of John J. Jackson, III (hereinafter "Jackson Aff.") at 3.[2] During the months of July and August, Mr. Jackson required physical therapy, which took up a good portion of his day. *Id.* Mr. Jackson also alleges that it took some time for the different plaintiffs to be reached and for them to read the opinion and come together and make a determination on how they should proceed. *Id.* at 6-9. Mr. Jackson also asserts that his law practice has significantly changed since the start of litigation. He is now a sole practitioner, whereas before, there were a number of other lawyers assigned to the case. *Id.* at 11. In addition, he has had trouble finding and keeping legal secretaries to assist him in the office. *Id.* Mr. Jackson asserts that he was unaware that the time was passing due to the different factors set forth above. *Id.* at 16.

STANDARD OF REVIEW

Federal Rules of Appellate Procedure require that a party wishing to appeal a district court judgment must file a notice of appeal within 30 days of the order of final judgment. FED. R. APP. P. (4)(a)(1). The party wishing to extend such time must "show excusable neglect or good cause" for failure to timely file the notice of appeal. FED. R. APP. P. 4(a)(5)(A)(ii). In determining which of the two standards to use, the circuit court in *Parke-Chapley v. Cherrington*, 865 F.2d 907 (7th Cir. 1989), stated that excusable neglect was the appropriate standard in cases where the deadline to file a motion to extend time had already passed. *Parke-Chapley*,

2. The Court notes that Mr. Jackson has failed to include a date sworn to on his affidavit.

865 F.2d 907, 910-11; *Makin v. Department of Corrections*, No. 93-1237, 1993 WL 523205, at *1 (10th Cir. filed Dec. 15, 1993); and *Chavez v. Public Defender Dept. State of N.M.*, No. 91-2055, 1991 WL 214683, at *1 (10th Cir. filed Oct. 22, 1991). The motion is thus reviewed using an excusable neglect standard. The court in *In re O.P.M. Leasing Services Inc.*, 769 F.2d 911, 917 (2nd Cir. 1985) held that the moving party has the burden of showing excusable neglect.

Within the last decade, the excusable neglect standard has changed. Prior to 1993, excusable neglect, as applied to Rule 4(a)(5) motions, was a strict standard and "was intended to apply only to 'extraordinary cases where injustice would otherwise result.' " *State of Oregon v. Champion Intern. Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982) (quoting *In re Estate of Butlers Tire & Battery Co.*, 592 F.2d 1028, 1034 (9th Cir. 1979)). In 1993, the Supreme Court took up the meaning of excusable neglect in a bankruptcy appeal. *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993). In the Supreme Court's interpretation, excusable neglect was given the ordinary meaning of the terms used. *Id.* at 388. The Court found that excusable neglect should be a more flexible standard. *Id.* at 393. According to this broader definition, courts may "accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. The next step, according to the Court, was to look at whether such neglect was excusable. *Id.* at 395. In determining whether neglect was excusable the Court used four "guideposts": "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay,

including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395. Although *Pioneer* was a bankruptcy case, the Tenth Circuit applied the four factors set out in *Pioneer* to a motion under the Federal Rules of Appellate Procedure, Rule 4(a)(5). *City of Chanute, Kansas v. Williams Natural Gas Company*, 31 F.3d 1041 (10th Cir. 1994). Furthermore, the Tenth Circuit in Chanute opined that fault in delay was the most important factor in determining excusable neglect. *Id.* at 1046. We therefore, use this lesser standard in evaluating whether plaintiff's failure to file a notice of appeal within the thirty-day deadline constitutes excusable neglect.

DISCUSSION

Applying *Pioneer* to the facts presented to us, we find that Mr. Jackson has not sufficiently documented the reasons for his failure to timely file a notice of appeal. We therefore cannot find that his reasons for delay constitute excusable neglect. His carelessness in failing to appreciate the time limits imposed under Fed. R. App. P. Rule 4(a)(b) does cause some prejudice to the parties based on the loss of finality. See *Active Glass Corp. v. Architectural and Ornamental Iron Workers Local Union 580*, 899 F. Supp. 1228 (S.D.N.Y. 1995) (stating that there is a loss of finality when the court is asked to deviate from the rigid requirements of Rule 4(a)(1) in a motion that was 28 days past the deadline to file a notice of appeal). With regard to the second factor, the length of delay was minimal and we cannot discern any effect on the judicial proceedings. See *Id.* (finding that the delay and effect on the proceedings were insignificant). Having looked at the record that the parties have presented, we find nothing that would indicate Mr. Jackson acted in bad faith.

The third factor, the reasons for delay, is the controlling factor in this case. Mr. Jackson asserts a combination of factors including health, inability to contact plaintiffs, changes in his law practice and secretarial support, and not appreciating that the time was passing. See, in general, Jackson Aff. In certain circumstances, injury or illness may rise to the level of excusable neglect. Such illness must be "so physically and mentally disabling that counsel is unable to file the appeal and is not reasonably capable of communicating to co-counsel his inability to file." *Active Glass Corp.*, 899 F. Supp. at 1231 (citing *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984) (explaining that counsel's illness which "involved diarrhea, vomiting, and a five pound weight loss over 36 hours" was well supported and constituted excusable neglect.); *J.P. Fyfe, Inc. v. Bradco Supply Corp.*, 96 B.R. 479, 483-84 (D.N.J. 1989) (holding that the attorney of record's use of medication and inability to speak on the phone due to her illness was sufficient for a finding of excusable neglect); Cf. *In re A.H. Robins Company Inc.*, 219 B.R. 153 (E.D. Va. 1998) (finding that counsel failed to include supporting documentation in her affidavit relating to her illness and thus failed to show excusable neglect). In the instant case, however, Mr. Jackson's injuries were not so disabling that he was unable to work or communicate with clients or co-counsel. See Jackson Aff. 4-10, & 11.

Throughout the period for filing the notice of appeal Mr. Jackson's office was apparently open even though Mr. Jackson was submitting to physical therapy treatments. The preparation and filing of the motion of appeal is not a substantial task. Although Mr. Jackson was concerned about

filing a frivolous pleading if it should be later determined that the appeal was without merit, the timely filing of a notice of appeal is not a pleading that in and of itself raises this issue.

The disruption in his law office is insufficient to rise to the level of excusable neglect. The court in *Pioneer* stated that they gave "little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date." *Pioneer*, 507 U.S. at 398. See also *Synalloy Corporation v. Gray*, 831 F. Supp. 351 (Del. 1993) (finding that a lack of diligence by counsel for not contacting out-of-state counsel to determine the status of the case does not meet the excusable neglect standard).

Moreover, Mr. Jackson's claim that he was not accustomed to a thirty-day deadline does not rise to the level of excusable neglect. See *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998) (finding that failure to understand procedural rules does not meet the excusable neglect standard).

For these reasons the Court finds that the movant has not carried the burden of showing excusable neglect and therefore, the motion should be denied. It is therefore

ORDERED that Plaintiff, Wyoming Outfitters Association's Motion For Extension Of Time To File Notice Of Appeal shall be, and is, **DENIED**.

Dated this 18th day of September 2000.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — RULE INVOLVED

Fed. R. App. P. 4(a)

Rule 4. Appeal as of Right — When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for

judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

* * * *

Supreme Court, U.S.
FILED
FEB 6 2002
CLERK

(2)

No. 01-994

In The

Supreme Court of the United States

WYOMING OUTFITTERS ASSOCIATION, JIM ALLEN, TIM TREFREN, JOHN WINTER, BOBBI WADE, VINCE VAN ROEGEN, KIM R. CARRARA, WALTER LEE JONES, CRAIG ARTMAN, and ERIC LARSEN,

Petitioners,

v.

WYOMING GAME AND FISH COMMISSION, HAL CORBETT, LES HENDERSON, TRACY HUNT, L. GARY LUNDVALL, J. MICHAEL POWERS, MIKE MUNZIE, DAVE STEGER, and JOHN BAUGHMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Tenth Circuit (Appendix to Petition for Writ of Certiorari ("Pet. App.") at 1a-5a) affirming the order of the United States District Court for the District of Wyoming denying Petitioners' motion for an extension of time, is reported at 2001 WL 1176390 (10th Cir. (Wyo.) Oct. 5, 2001). The order of the United States District Court for the District of Wyoming denying Petitioners' motion for an extension of time (Pet. App. at 6a-12a), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered October 5, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On June 16, 1998, Petitioners brought suit in United States District Court for the District of Wyoming, claiming that Respondents' regulations allocating hunting licenses between residents and nonresidents violated the Equal Protection Clause and the Dormant Commerce Clause.

The District Court entered judgment against Petitioners on July 5, 2000, granting Respondents' Motions for Summary Judgment and to Dismiss. The District

Court held that two categories of Petitioners, the Wyoming Outfitters Association and the individual outfitters, did not have standing. These Petitioners were unable to show injury in fact because they are not subject to differential categorization or treatment in the allocation of licenses which they neither purchase nor sell. The District Court further held that, although the nonresident hunter category of Petitioners did have standing, their claims failed to state a claim as a matter of law. In addition, the District Court held that nonresident hunters were not a suspect class, hunting was not a fundamental right, and the Respondents' regulations were rationally related to a legitimate state interest. The decision that the District Court entered on July 5, 2000, is not the subject of Petitioners' Writ.

Pursuant to FED. R. APP. P. 4(a)(1), Petitioners had until August 5, 2000, to appeal the July 5, 2000, final Order of the District Court. Petitioners had filed no notice of appeal by August 5, 2000, nor had Petitioners contacted Respondents suggesting a need for extension of time.

More than two weeks later, on August 22, 2000, Petitioners filed a Motion for Extension of Time in Which to File Appeal, as well as the Notice of Appeal in question. Respondents filed an Opposition to the Motion for Extension of Time on September 1, 2000, and a hearing was held before the United States District Court for the District of Wyoming on September 12, 2000.

Petitioners' Motion for Extension of Time was initially filed without supporting documentation. Petitioners' Motion alleged that the motion was made

necessary because of the complexity of the issues, the large number of party plaintiffs, the difficulty in locating party plaintiffs, the heavy schedule of counsel, and counsel's delay in receiving the judgment. More than two weeks later, after Respondents opposed the Motion for Extension of Time, counsel for Petitioners filed into the official record of the case an affidavit chronicling the various factors Petitioners now claim were not considered by the District Court or the Tenth Circuit Court of Appeals.

On September 18, 2000, the District Court denied Petitioners' Motion for Extension of Time in Which to File an Appeal because the Petitioners failed to make a showing of "excusable neglect" as required under FED. R. APP. P. 4(a)(5). Pet. App. at 6a-12a.

The Tenth Circuit Court of Appeals affirmed the District Court's denial of the Motion for Extension of Time on October 5, 2001. After carefully reviewing the record, the Tenth Circuit concluded that the District Court did not abuse its discretion in denying Petitioners' Motion for Extension of Time. Pet. App. at 1a-5a.

ARGUMENT

1. The Tenth Circuit Court of Appeals Applied the Appropriate Standard of Review

The trial judge is in the best position to assess the equities of the circumstances relating to a motion for an extension of time to file an appeal. *Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907, 912 (7th Cir. 1989). The

rule on granting such motions therefore uses the permissive term "may," rather than the mandatory term "shall": "[t]he district court *may* extend the time to file a notice of appeal if . . . that party shows excusable neglect . . . " FED. R. APP. P. 4(a)(5) (emphasis supplied).

Thus, the decision to grant such a motion is committed to the discretion of the trial court and is therefore discretionary with the trial court. *Parke-Chapley*, 865 F.2d at 912. Accordingly, courts of appeal defer to the trial court's decision on such a motion absent an abuse of that court's discretion. *Graphic Communications International Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 3-4 (1st Cir. 2001), *citing Pontarelli v. Stone*, 930 F.2d 104, 109 (1st Cir. 1991); *Parke-Chapley*, 865 F.2d at 911, *citing Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971); Federal Procedure, *Appeal, Certiorari, and Review* (Lawyers Cooperative Publishing: 1994), § 3:547, pp. 236-237, n.26 and cases cited therein.

The standard of review of a court's denial of such a motion is therefore that of the abuse of discretion, rather than error. *In re O.P.M. Leasing Services Inc.*, 769 F.2d 911, 915 (2nd Cir. 1985). Accordingly, the mere fact that an appellate court would have weighed the evidence differently had it been the trier of fact is insufficient to warrant reversing the district court's denial.

Because the trial court is therefore accorded wide discretion in deciding that neglect is not excusable in a particular case, appellate courts will not meddle with those decisions unless some exceptional justification exists. *Quebecor*, 270 F.3d at 6-7. Thus, an appellant must

convince the appellate court of a definite and firm conviction that there was a clear error in judgment by the trial court. *In re O.P.M.*, 769 F.2d at 915.

If the standard of review were not whether the court abused its discretion by ruling in a manner that was unreasonable, every litigant whose motion to file a late notice of appeal failed would appeal the denial of his motion, and the courts of appeals would be flooded with appeals of entirely reasonable decisions in the hope of winning a second bite at the same apple. Such a regime could hardly be characterized as one in which the decision on whether the neglect was excusable was committed to the discretion of the trial court. Such a regime was therefore never the intention of the framers of the Rules.

For these reasons, a trial court has not abused its discretion if a reasonable person could agree with the trial court's decision. *See* Federal Procedure, *Appeal, Certiorari, and Review* (Lawyers Cooperative Publishing: 1994), § 3:547, pp. 236-237, *citing Ooely v. Schwitzer Div., Household Mfg., Inc.*, 961 F.2d 1293 (7th Cir. 1992), *cert. denied*, 506 U.S. 872 (1992) (court abuses its discretion in ruling on motion for extension to file notice of appeal if no reasonable person could agree with the court's decision).

The rule on late filing of notices of appeal requires a showing of excusable neglect or good cause: "[t]he district court may extend the time to file a notice of appeal *if* . . . that party shows excusable neglect or good cause." FED. R. APP. P. 4(a)(5) (emphasis supplied). The mere assertion that the denial of the extension was somehow unfair or created some undefined injustice is therefore

insufficient to warrant reversal of a district court's denial of an extension. *U.S. v. Atkinson*, 748 F.2d 659, 661 (Fed. Cir. 1984). Similarly, a court does not abuse it discretion by denying a motion for an extension of time for filing a notice of appeal where there are no unique or extraordinary circumstances. *Quebecor*, 270 F.3d at 6.

Moreover, the burden of proving "excusable neglect" in the trial court lies with the movant. The text of the rule itself authorizes the district court to extend the time to file a notice of appeal on the grounds of excusable neglect only if the party seeking the extension *shows* excusable neglect. FED. R. APP. P. 4(a)(5)(A)(ii). Where the movant has simply failed to meet that burden, a court's denial of its motion cannot be an abuse of its discretion.

In the case at bar, the District Court considered the detailed and lengthy pleadings submitted by Petitioners before ruling on their Motion for Extension of Time to file a late notice of appeal. *See* Pet. App. at 7a, n.1. These pleadings included numerous allegations of fact concerning how counsel's legal practice, medical condition, and relationship with his clients excused the failure to timely file a notice of appeal. In addition, the District Court heard oral argument from counsel for all parties regarding these allegations. Because the District Court is a trial court, i.e., a court specifically designed for the trying of facts and before which the facts are actually tried, it could best assess the equities of the circumstances relating to the motions. *Parke-Chapley*, 865 F.2d at 912.

As noted by the Tenth Circuit Court, the fact that counsel was able to perform various duties related to his extensive pro bono practice indicated that he was not so

physically or mentally disabled that he could not file a simple notice of appeal. Pet. App. at 4a. Further, the form for a notice of appeal consists of a caption, signature block, and a single sentence of text. *See* Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure. As to counsel's inability to communicate with clients, that was entirely the product of the Petitioners' choice to make themselves unavailable to their own attorney. For all these reasons, it was entirely reasonable for the District Court to find that the circumstances failed to excuse counsel's failure to timely file a notice of appeal.

Because the District Court's decision was entirely reasonable, the Tenth Circuit Court of Appeals could not have reached a definite and firm conviction that there was a clear error in judgment by the trial court. The District Court therefore cannot be said to have abused its discretion. *In re O.P.M.*, 769 F.2d at 915.

At the very least, the District Court's decision cannot be considered unreasonable. Accordingly, reversal of that decision was precluded by the fact that the rules themselves commit such decisions to the discretion of the trial court. *See* FED. R. APP. P. 4(a)(5) ("may" rather than "shall"); *Parke-Chapley*, 865 F.2d at 912 (decision committed to the discretion of the trial court). The Tenth Circuit Court of Appeals therefore did not err in affirming the District Court's decision. In conclusion, the decision on Petitioners' motion was committed by law to the discretion of the trial court and the court's exercise of that discretion was in fact thoroughly and well reasoned. Accordingly, the District Court did not abuse its discretion in declining to grant Petitioners' motion to file a late notice of appeal. FED. R. APP. P. 4(a)(5). Because the Tenth

Circuit Court of Appeals affirmance thus was correct, this Court should deny Petitioners' petition for certiorari.

2. There is No Compelling Reason for This Court to Grant Petitioners' Writ of Certiorari

SUP. CT. R. 10 provides considerations governing when this Court will grant review on a petition for certiorari. While this Court's discretion to grant certiorari is unquestionably broad, the Rule states that a "petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. The Rule further describes several situations which this Court might consider warranting the granting of certiorari.

Petitioners in this case have not stated a compelling reason for this Court to grant certiorari. Despite Petitioners' attempts to mutate the facts of this case, the District Court and Court of Appeals decisions do not conflict with previous decisions of this Court, and the District Court and Court of Appeals decisions do not in any way conflict with decisions of other courts of appeals. Petitioners suggest that the District Court and the Court of Appeals used an inappropriate legal standard when considering the issues before them. However, the Petitioner goes on to claim that the correct legal standard is the one set forth in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). To the contrary, that decision is thoroughly described and applied in both the District Court and the Court of Appeals decisions. Rather than bringing a compelling controversy before this Court, Petitioners, unhappy with the factual findings of the District Court and Court of

Appeals, ask this Supreme Court of the United States of America to once again reconsider the factual findings and reapply the properly stated rule of law to those findings. Because this Court is one of review and law, Petitioners have failed to state a compelling reason for this Court to grant certiorari.

A. The District Court and Court of Appeals Did Not Decide an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court.

Petitioners' initial claims before the Federal District Court for the District of Wyoming were dismissed or summarily disposed of on July 5, 2000. Petitioners had until August 5, 2000 to appeal that decision. FED. R. APP. P. 4(a)(1). Instead, Petitioners, on August 22, 2000, filed a Motion for Extension of Time in Which to File an Appeal. Pursuant to FED. R. APP. P. 4(a)(5), the District Court could extend the time for filing an appeal if Petitioners could demonstrate "excusable neglect" in filing late.

When considering whether to extend the time for filing an appeal, a court must consider that the prevailing party needs to know at some fixed time how the litigation stands. *In re O.P.M.*, 769 F.2d at 916; *In re Orbitec Corp.*, 520 F.2d 358, 362 (2nd Cir. 1975); *C-Thru Products, Inc. v. Uniflex, Inc.*, 397 F.2d 952, 955 (2nd Cir. 1968); *Fase v. Seafarers Welfare and Pension Plan*, 574 F.2d 72, 75 (2nd Cir. 1978).

Thus, the Advisory Committee on Appellate Rules has noted that the timely filing of a notice of appeal "is of the utmost importance." Advisory Committee Notes to

the 1967 Adoption of FED. R. APP. P. 3. Accordingly, the timely filing of a notice of appeal is both mandatory and jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Houston v. Lack*, 487 U.S. 266 (1988); *Browder v. Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978), *rehearing denied*, 434 U.S. 1089 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960).

For these reasons, "[t]he power of the federal courts to extend the time limits on the invocation of appellate jurisdiction is severely circumscribed." *Goode v. Winkler*, 252 F.3d 242, 245 (2nd Cir. 2001), *quoting Mendes Junior International Co. v. Banco Do Brasil, S.A.*, 215 F.3d 306, 312 (2nd Cir. 2000).

Indeed, the Federal Rules of Appellate Procedure generally require that a notice of appeal be filed within 30 days after the judgment or order appealed from is entered. FED. R. APP. P. 4(a)(1)(B). However, those rules also provide that the district court may extend the time to file such a notice if a party so moves no later than 30 days after the time prescribed by this rule expires and shows "excusable neglect." FED. R. APP. P. 4(a)(5)(A).

If ordinary neglect were excusable, it would be hard to conceive of what neglect would not be excusable. *Lowry v. McDonnell Douglas Corporation*, 211 F.3d 457, 464 (8th Cir. 2000); *In re O.P.M.*, 769 F.2d at 917. Accordingly, if a mere mistake by counsel sufficed, the requirement of excusable neglect would be meaningless. *In re O.P.M.*, 769 F.2d at 918, *citing Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 411 (1st Cir. 1976), *cert. denied*, 429 U.S. 886

(1976), *rehearing denied*, 429 U.S. 988 (1976). Mere "garden-variety" attorney inattention therefore cannot be excusable. *Lowry*, 211 F.3d at 464.

In order, therefore, to meet the standard of "excusable neglect", the circumstances relating to the neglect must be unique or extraordinary. *Quebecor*, 270 F.3d at 6-8; *Pontarelli*, 930 F.2d at 111; *State of Oregon v. Champion International Corporation*, 680 F.2d 1300, 1301 (9th Cir. 1982); *Maryland Casualty Co. v. Conner*, 382 F.2d 13, 17 (10th Cir. 1967); *accord*, *Parke-Chapley*, 865 F.2d at 911 ("unusual").

The very purpose of achieving finality that lies behind both the rule requiring timely appeal, and the rule allowing extensions of time to appeal for neglect only upon a showing that the neglect is excusable, would be undermined if ordinary neglect sufficed to excuse the failure to timely file an appeal. *Allied Steel, General Contractor v. City of Abilene*, 909 F.3d 139, 143 (5th Cir. 1990); *Champion*, 680 F.2d at 1301.

If ordinary neglect sufficed to excuse the failure to timely file an appeal, the 30-day period for appeal provided in Federal Rule of Appellate Procedure 4(a) would be converted into a 60-day one – a result the rule's framers clearly did not intend. *Pontarelli*, 930 F.2d at 111; *Allied Steel*, 909 F.2d at 142-143; *In re O.P.M.*, 769 F.2d at 917. Such a construction would simply eviscerate the rule that a party must appeal within thirty days.

As a member of the Advisory Committee that drafted the rule has explained, "[w]e did not want lawyers to be taking advantage of this extra 30 days as a matter of course; it is not meant to cover the usual excuse that the

lawyer is too busy, which can be used, perhaps truthfully, in almost every fact. . . . It is hoped that the courts give effect to this . . . standard in the spirit in which it was written – that is, to take care of emergency situations only." STERN, ROBERT, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 298-299 (1967), *quoted at* 16A WRIGHT & MILLER, *Federal Practice and Procedure, Jurisdiction and Related Matters*, § 3950.3, p. 153, n.22.

Ordinary neglect therefore does not suffice to meet the standard of excusable neglect. *Allied Steel*, 909 F.2d at 142; *In re O.P.M.*, 769 F.2d at 916; *Champion*, 680 F.2d at 1301; *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1063 (5th Cir. 1979), *citing* STERN, *Changes in the Federal Appellate Rules*, 41 F.R.D. at 298-299; *Selph v. Council of City of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979); 16A WRIGHT & MILLER, *Federal Practice and Procedure, Jurisdiction and Related Matters*, § 3950.3, p. 153, n.22, *quoting* STERN, *Changes in the Federal Appellate Rules*, 41 F.R.D. at 298-299.

The federal rules provide practitioners a form for a notice of appeal and it consists of a caption, signature block, and a *single sentence of text*. *See* Form 1 in the Appendix of Forms to the Federal Rules of Appellate Procedure. The ease with which a notice of appeal may thereby be perfected warrants construing the rules permitting late filing of such notices narrowly.

The District Court, in considering Petitioners' Motion for Extension of Time, held that the proper standard for considering whether "excusable neglect" has been demonstrated is the standard set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380

(1993). *See Stutson v. United States*, 516 U.S. 193, 195 (1996); *City of Chanute, Kansas v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994) (holding that *Pioneer* analysis of what constitutes "excusable neglect" in the bankruptcy context is the same analysis which should be applied when considering motions for extension of time under FED. R. APP. P. 4(a)(5)). The District Court further stated that the standard should be a somewhat flexible standard. Pet. App. at 9a.

The circumstances *Pioneer* found relevant to the excusable neglect determination include the circumstances surrounding the omission, the danger of prejudice to the other parties, the length of the delay, the reason for the delay, and the good faith of the party seeking relief. *Pioneer*, 507 U.S. at 395. Accordingly, this Court noted that the excusable neglect standard was "flexible" and "somewhat elastic." *Id.* at 392.

However, this Court also noted that the requirements in the federal rules that the neglect be excusable was needed in order to deter parties from freely ignoring court-ordered deadlines. *Id.* at 395. This Court therefore rejected the notion that the analysis should focus on whether the party seeking to file late reasonably policed their attorney, rather than on whether the attorney did all he reasonably could to comply with the deadline. *Id.* at 396-398.

This Court therefore affirmed that inadvertence, ignorance of the rules, or mistakes constituting the rules do not constitute excusable neglect absent unusual circumstances. *Id.* at 392. Further, this Court found that the fact that counsel was experiencing upheaval in his law

practice at the time of the deadline in question was not entitled to much weight. *Id.* at 398.

Accordingly, even after the *Pioneer* decision, courts of appeals have overturned the granting of motions for extensions to file late appeals where there was simply "garden-variety attorney inattention" rather than unique and unusual circumstances. *See, e.g., Lowry,* 211 F.3d at 463-464. Similarly, even after the *Pioneer* decision, courts of appeals have affirmed denials of motions for extensions of time to file late appeals because of the absence of unique or extraordinary circumstances. *See, e.g., Quebecor,* 270 F.3d at 6.

While this Court's decision in *Pioneer* suggests that excusable neglect is more "forgiving" than certain lower court authority preceding it had held, there still must be a satisfactory explanation for the late filing in order for a motion to permit it is to be granted. *Quebecor,* 270 F.3d at 5. An explanation that does not demonstrate that the circumstances relating to the neglect were unique or extraordinary is not satisfactory. *Id.*

Moreover, while *Pioneer* enunciated a number of different factors relevant to the determination of whether neglect is excusable, the *reason for missing the deadline* remains both critical and key in the analysis. *Quebecor,* 270 F.3d at 5; *Lowry,* 211 F.3d at 463. In addition to its own central importance, this factor may also affect others. For example, the fact that such reason is inconsistent and shifting suggests that the party making those excuses might not be acting in good faith. *Lowry,* 211 F.3d at 463.

If unique or exceptional circumstances were not required for neglect to be excusable, mere ordinary

neglect would suffice, the requirement that the neglect be excusable eviscerated, the district courts would be flooded with motions to file late notices of appeal, and the requirement that notices be filed within thirty days would be rendered unenforceable.

Rather than conflicting with this Court's *Pioneer* opinion, the District Court in the case at bar applied the legal analysis set forth in *Pioneer*. The District Court not only recognized that *Pioneer* was the controlling authority, the District Court accurately set forth the four guideposts from that decision. Pet. App. at 9a-10a.

Petitioners' assertion that the District Court's or the Tenth Circuit Court's decisions applied a "different, inflexible 'excusable neglect' test or standard" is belied by the plain text of the opinions. The District Court expressly enumerated and applied the four factors enunciated in *Pioneer*. Pet. App. at 9a-12a. In fact, the court noted that this was a "lesser" standard than earlier law had provided in construing FED. R. APP. P. 4(a)(5). The Tenth Circuit, after again enumerating and expressly applying the four factors set forth in *Pioneer*, found "nothing to suggest that the district court abused its discretion." Pet. App. at 3a-4a. Both courts properly stated and applied the exact "excusable neglect" test set forth in *Pioneer*, and therefore neither decision conflicts with the law of that case.

The four factors for a court to consider when determining whether neglect in filing a motion for extension of time is excusable are: danger of prejudice; length of delay and its potential impact on judicial proceedings; reason for delay including whether it was within the reasonable

control of the movant; and whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. A court must consider these factors taking into account all of the relevant circumstances surrounding the party's omission. *Id.*

The District Court properly considered each of these circumstances in finding that Petitioners did not show "excusable neglect". As to three of the factors, the District Court agreed that the delay in judicial proceedings would result in prejudice to Respondents,[1] but the court reviewed the evidence and found that the length of the delay would not have a problematic impact on judicial proceedings, and that it appeared that the attorney for Petitioners acted in good faith. Given these factors, the District Court, upon review of all the available evidence, still held that Petitioners had not established "excusable neglect" in failing to meet the thirty-day filing requirement.

The District Court held that the fourth *Pioneer* factor, the reason for delay and whether it was within the reasonable control of the movant, was the controlling factor

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[1] The purpose of the thirty-day time period set forth in FED. R. APP. P. 4(a) is to provide finality to court proceedings. "Requiring courts constantly to adjudicate claims of extraordinary or unique circumstances would defeat the purpose of the time limitation in Rule 4(a)(1) – to provide a definite point at which, in the absence of a notice of appeal, litigation will cease. Rule 4(a)(5) clearly indicates that the potential appellants may not regard the period during which a District Court may extend the time for filing a notice of appeal as a further period in which to ponder their options." *Allied Steel*, 909 F.2d at 143.

in its decision. The Tenth Circuit Court of Appeals, following this Court's *Pioneer* test, has previously held that "the fault in delay remains a very important factor – *perhaps the most important single factor* – in determining whether neglect is excusable." *City of Chanute*, 31 F.3d at 1046 (emphasis added).

The District Court was well aware of all the issues raised by counsel for Petitioners and addressed each factual allegation in its holding. The District Court was correct in finding that counsel's illness was not so physically and mentally disabling that counsel was unable to file the appeal or communicate with co-counsel. Pet. App. at 11a; *Active Glass Corp. v. Architectural and Ornamental Iron Workers Local Union 580*, 899 F. Supp. 1228, 1231 (S.D.N.Y. 1995); *J.P. Fyfe, Inc. of Florida, v. Bradco Supply Corp.*, 96 B.R. 479, 483-484 (D.N.J. 1989); *In re A.H. Robins Company, Inc.*, 219 B.R. 153 (E.D. Va. 1998).

As the Tenth Circuit noted, counsel's failure to file a mere notice of appeal was belied by his apparent ability to perform various duties related to his extensive pro bono practice. Pet. App. at 4a. In addition, the accident from which counsel was recovering during the thirty-day period following the decision of the District Court had occurred *more than six months* before the notice of appeal was due. Pet. App. at 8a. The Tenth Circuit Court concluded that counsel was not so physically or mentally disabled that he was unable to file a notice of appeal. Pet. App. at 4a. Since such a finding is factual, rather than legal, it is not one of the kind that this Court is inclined to unsettle. *Pioneer*, 507 U.S. at 397, *citing Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In addition, the District

Court considered the disruption of counsel's legal practice and was correct in holding that such claims should be given little weight in assessing the excusability of counsel's delay. This Court in *Pioneer* specifically held the very same thing:

> In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date. We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases.

Pioneer, 507 U.S. at 398; *see also Pedereaux v. Doe*, 767 F.2d 50, 52 (3rd Cir. 1985) (approving district court ruling that fact "that counsel spent much of the latter period of time preparing for the trial of other matters does not excuse the failure to attend to the insubstantial task of filing a notice of appeal").

Unlike the unconventional limitation date described in the *Pioneer* case, the time limit for filing a notice of appeal in this case was clear – it was the standard thirty days described in FED. R. APP. P. 4(a). The circumstances surrounding the neglect at issue in *Pioneer* were held excusable precisely because the form of the notice of the bar date at issue in that case was unusual: such notices ordinarily are prominently announced and accompanied by an explanation of their significance. *Pioneer*, 507 U.S. at 398-399. In stark contrast, however, orders dismissing cases such as in the case at bar, ordinarily are not accompanied by an explanation of their significance. Therefore, in the instant case, Petitioners have failed to prove the

circumstances surrounding their late filing were unusual, and therefore have failed to prove that the delay was excusable as the circumstances in *Pioneer* were.

Further, Petitioners' counsel admitted in his affidavit filed with the District Court that his failure to meet the deadline was partially due to the fact that he is unaccustomed to a thirty-day deadline. Despite counsel's lack of dealing with the usual deadlines in the District Court for the District of Wyoming, as the District Court correctly observed, failure to understand such procedural rules does not rise to the level of "excusable neglect." *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998).

Because counsel was physically and mentally able to file a notice of appeal, that he also had commitments to other cases, difficulties securing competent secretarial service, and had withdrawn from his former law firm, all fail to excuse his neglect. After all, a notice of appeal requires merely caption, signature block, and a *single sentence of text*. *See* Form 1 in the Appendix of Forms to the Federal Rules of Appellate Procedure. Petitioners failed to prove that their counsel's neglect was any thing other than "garden-variety" attorney inattention. They therefore did not meet their burden of showing that their counsel's neglect was excusable. *Lowry*, 211 F.3d at 464.

The District Court also considered all of the other factors described in Petitioners' Writ, including counsel's assertion of difficulty communicating with clients. *See* Pet. App. at 8a, 11a-12a. The District Court's holding is correctly based on the fact that other urgent business situations which cause plaintiffs to fail to authorize their

counsel to file an appeal do not rise to the level of excusable neglect. *Allied Steel*, 909 F.2d at 141-143. Petitioners chose to make themselves unavailable by taking treks into the wild. If parties could avoid the deadline for filing notices of appeal simply by voluntarily electing to make themselves unavailable, that deadline would no longer be a requirement of law.

In total, the Petitioners failed to prove that unique nor exceptional circumstances warranted the conclusion that their neglect to timely file a notice of appeal was excusable. Each of the circumstances that Petitioners relied upon are altogether ordinary, rather than unique or exceptional. Counsel is hardly the only or first lawyer with commitments to other cases, difficulties securing competent secretarial service, withdrawal from his former law firm, communication problems with clients who have chosen to make themselves unavailable, and the need for physical therapy. Indeed, many, if not most, lawyers experience these or similar challenges during some or many phases of their careers.

Petitioners argue, however, that counsel's circumstances were unique and exceptional *in the aggregate*. But some of these circumstances are inconsistent with others, i.e., compare counsel's claimed inability to represent Petitioners with his ability to represent his pro bono clients. The fact that the reasons for missing the deadline appear inconsistent and shifting suggests that the party making those excuses might not be acting in good faith. *Lowry*, 211 F.3d at 463. In any event, this Court has already rejected the suggestion that the fact that counsel was experiencing *upheaval* in his law practice at the time of the

deadline in question was not entitled to great weight. *Pioneer*, 507 U.S. at 398.

At all events, almost any party to any dispute could argue truthfully that unique or extraordinary circumstances had distracted its attention. *Allied Steel*, 909 F.2d at 143. Thus, if the mere fact that the circumstances relating to neglect were unique or extraordinary were sufficient to excuse the neglect, district courts would have no principled means of distinguishing circumstances that excuse neglect from circumstances that do not. *Allied Steel*, 909 F.2d at 143.

In sum, the circumstances surrounding the neglect in filing a timely notice of appeal here are neither unique nor exceptional. Those circumstances are therefore insufficient to excuse that neglect. *Quebecor*, 270 F.3d at 6-8; *Pontarelli*, 930 F.2d at 111; *Parke-Chapley*, 865 F.2d at 911; *Champion*, 680 F.2d at 1301; *Maryland Casualty*, 382 F.2d at 17. Accordingly, the District Court did not err in declining to grant Petitioners' motion to file a late notice of appeal. FED. R. APP. P. 4(a)(5)(A)(i).

The Tenth Circuit Court of Appeals correctly reviewed the District Court's determination of the presence or absence of excusable neglect based on an abuse of discretion standard. Although the Circuit Court only specifically mentioned a few of Petitioners' complaints in the Order, the Court had the entire record of proceedings before it. Simply because a court does not state each individual fact supporting its decision, such omissions are not indicative of a failure to consider those facts. In fact, the Court of Appeals plainly averred to review of the entire record by holding "[b]ased on the record before us,

we find nothing to suggest that the district court abused its discretion." Pet. App. at 3a-4a.

Both the District Court and the Court of Appeals applied the four part test for discerning "excusable neglect" described in *Pioneer*. The District Court applied all the facts provided by Petitioners to the test and still held that Petitioners had not met the excusable neglect standard described in *Pioneer*. The Tenth Circuit Court of Appeals reviewed the entire record and still found that the District Court did not abuse its discretion in holding that Petitioners had not met the excusable neglect standard in *Pioneer*. Despite Petitioners' dissatisfaction with those holdings, the fact that the District Court and Tenth Circuit Court of Appeals did not find that their late filing was the result of excusable neglect was not a misapplication of this Court's case law. Rather, the District Court and Tenth Circuit Court of Appeals correctly applied the facts of this case to the law set forth in *Pioneer*, and correctly held that Petitioners had not met the standard.

B. The District Court and Court of Appeals Decisions Did Not Conflict with Those of Other Courts of Appeals.

Petitioners suggest that the decisions of the District Court and Tenth Circuit Court of Appeals in this case are in conflict with the decision of the Fifth Circuit Court of Appeals in *United States v. Clark*, 193 F.3d 845 (5th Cir. 1999). In *Clark*, the defendant claimed to have demonstrated "excusable neglect" in filing late because his attorney failed to file when he asked the attorney to do so. *Id.* at 847. The defendant's counsel neither filed the

appeal as requested, nor withdrew from the case. *Id.* Based on those facts, the Fifth Circuit held that the defendant received ineffective assistance of counsel and the appeal was therefore filed late due to excusable neglect. *Id.* But, the Fifth Circuit Court expressly distinguished the facts in *Clark* from those in other cases where the attorney merely misunderstood the law by stating "in situations like the instant case, we are not faced with the fear that allowing excusable neglect based on an attorney mistake would lead to 'almost every appellant's lawyer . . . plead[ing] his own inability to understand the law when he fails to comply with a deadline.' " *Id. (citing Halicki v. Louisiana Casino Cruises,* 151 F.3d 465, 470 (5th Cir. 1998)).

In the case now before this Court, Petitioners do not contend that they requested their counsel to file and that he otherwise failed to do so. Rather, Petitioners' counsel offers a myriad of excuses as to why he failed to file a notice of appeal in a timely manner, all of which were considered by the District Court. Thus, the facts of this case are distinguished from those at issue in *Clark* on the very same basis that the Fifth Circuit in *Clark* itself distinguished the facts at issue from other cases. The factual background of both cases being different, it is no surprise that application of a "flexible standard" set forth in *Pioneer* would result in different outcomes. *See Pioneer,* 507 U.S. at 388-389 (describing a "flexible" standard).

Petitioners also cite *Kyle v. Campbell Soup Company,* 28 F.3d 928 (9th Cir. 1994), *cert. denied,* 513 U.S. 867 (1994), for the proposition that Circuit Courts of Appeals are in

disagreement as to whether mistakes of counsel constitute "excusable neglect." Pet. App. at 23. A simple reading of both cases makes clear that there is no conflict in application of the law to the facts. Rather, differing facts in the two cases resulted in differing conclusions. In *Kyle*, in clear contrast to *Clark*, the mistakes of counsel did not rise to the level of professional incompetence and were held not to be excusable. The Ninth Circuit Court of Appeals reviewed the facts, specifically that counsel misunderstood the deadline, and held that such a misunderstanding was not excusable neglect. In making that finding, the Ninth Circuit relied heavily on this Court's decision in *Pioneer*. *See Kyle*, 28 F.3d at 932. Despite Petitioners' claim that the *Kyle* opinion conflicts with *Pioneer*, this Court summarily denied Kyle's petition for writ of certiorari. *Kyle v. Campbell Soup Co.*, 513 U.S. 867 (1994).

The case before the Court on this Petition for a Writ of Certiorari is factually distinct from both cases cited by Petitioners as conflicting. Indeed, the cases cited by Petitioners as conflicting are also both factually distinct. However, there is an overriding theme common to all three cases: the application of the flexible standard for determining excusable neglect set forth in *Pioneer* to the differing factual scenarios. The correct legal standard was used in all cases, and there is no conflict among the circuits as to its proper application.

C. A Petition for Review Is Rarely Granted When the Asserted Error Consists of Erroneous Factual Findings or the Misapplication of a Properly Stated Rule of Law.

SUP. CT. R. 10 provides that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The District Court and the Tenth Circuit Court of Appeals both properly stated the factors for determining excusable neglect set forth by this Court in *Pioneer*. Petitioners merely claim that both Courts misapplied the facts to that rule of law, because Petitioners are unhappy with the result of that application. However, the jurisdiction of this Court should not be squandered merely to give a defeated party another hearing on the facts.

As was so succinctly stated by Chief Justice Taft, "[t]he jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Petitioners are unhappy with the opinions of the District Court and the Circuit Court of Appeals. The Petition for Writ of Certiorari before this Court is merely an attempt to rehear Petitioners' complaints and the Petition should therefore not be granted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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